IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 84

WILLIAM L. GREENE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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CITATIONS

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Petitioner William L. Greene prays that a writ of certiorari issue to review the order of the United States Court of Claims entered in the above entitled case on December 20, 1962.

THE ORDER BELOW

The Court of Claims filed no opinion. Its unreported order of December 20, 1962, denying review of Commissioner Day's order of December 5, 1962, is reprinted in the Appendix hereto (*infra*, p. 1a), together with Commissioner Day's order.

JURISDICTION

The order of the Court of Claims (R. 31), signed by Acting Chief Judge Laramore on December 20, 1962, denied petitioner's request for a review of Commissioner Day's order of December 5, 1962 (R. 30), suspending further proceedings "pending pursuit of administrative remedies by the Department of Defense." Under Rule 37(d)(4) of the Court of Claims Rules, the order of the Commissioner became the order of the Court by virtue of such denial of review. The jurisdiction of this Court rests on 28 U.S.C. § 1255 (1).

QUESTIONS PRESENTED

1. Does this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474, contemplate and direct that one deprived of a job by Defense Department officials, whose actions were found by this Court to be unauthorized, shall receive monetary restitution for back pay losses in accordance with applicable regulations (Par. 26, Dept. of Defense Directive 5220.6, 20 Fed. Reg. 1553, February 2, 1955) or the Fifth Amendment to the Constitution of the United States?

2. Was it proper for the Court of Claims to suspend, without reaching the merits, a suit for monetary restitution under the aforesaid 1955 regulation and the Fifth Amendment and to remit the plaintiff to further proceedings before the Department of Defense under DOD Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

This case involves the Fifth Amendment of the United States Constitution; and Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955; and Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960. These are reprinted in pertinent part in Appendix B, *infra*.

STATEMENT OF THE CASE

A. Introduction

Prior to April 23, 1953, petitioner William L. Greene was vice-president and general manager of Engineering and Research Corporation (ERCO). On that date he was discharged by ERCO due to revocation of his security clearance by the Department of the Navy. In *Greene* v. *McElroy*, 360 U.S. 474, this Court held that the action of the Department was not validly authorized and that the officials of the Defense Department "were not empowered to deprive petitioner of his job" as they had done; thereafter, the District Court ordered that "any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged" from all Government records. (R. 4).

Petitioner then made formal demand on the Government for monetary restitution for loss of earnings pursuant to the applicable regulation, Section 26 of the Industrial Personnel Security Review Regulation DOD 5220.6, 20 Fed. Reg. 1553 (1955). Restitution was denied. Petitioner accordingly brought this suit in the Court of Claims for loss of earnings, basing his claim on the aforesaid regulation and the Constitution of the United States. (R. 7-8). The Court of Claims,

without expressing any view on the merits, entered an order (R. 30-31) suspending all proceedings before it pending Greene's institution of proceedings before the Department of Defense under a 1960 Regulation adopted following the decision in *Greene* v. *McElroy*. This procedure would require a hearing to determine whether petitioner is *presently* entitled to access clearance, a clearance which petitioner does not need or want, and, in the event of a favorable determination, empowers the Secretary of Defense *in his discretion* to award restitution. On the other hand, an unfavorable determination as to petitioner's present access clearance would, under the Government's theory, lead to a denial of any and all restitution.

Petitioner seeks review of that order, and a judgment of this Court that his claim is valid, or alternatively, a direction to the Court of Claims to adjudicate the merits of his claim without requiring prior resort to the procedure under the 1960 Regulation.

B. The Facts On Which Petitioner's Claim Is Based

The facts on which petitioner bases his claim may be sketched briefly here, for they are fully narrated in this Court's opinion in *Greene* v. *McElroy*, 360 U.S. 474 at 476-491.

(1) Greene, an aeronautical engineer, began work for ERCO in 1937 and, except for a brief leave of absence, remained with the firm until his discharge in 1953, having risen to be one of its chief executives because of the "excellence of his work", 360 U.S. at 476. ERCO, a firm devoted primarily to developing and manufacturing mechanical and electrical parts, performs classified work for various armed services. In

connection with this work, Greene had thrice obtained security clearances, two of them for Top Secret.[1]

(2) On December 11, 1951, petitioner was informed by the Army-Navy-Air Force Personnel Security Board (PSB) that "access by you to contract work and information [at ERCO] . . . would be inimical to the best interests of the United States" and that his clearances were being revoked. He was also advised that he could seek a hearing before the Industrial Employment Review Board (IERB), and petitioner took that course of action. Petitioner, with counsel, appeared at hearings before the IERB with respect to certain allegations made about his past associations. The Government presented no witnesses at these hearings and petitioner had no opportunity to confront or question persons who had allegedly made statements adverse to him. On January 29, 1952, on the basis of these hearings and of the confidential reports, the IERB reversed the action of the PSB and informed petitioner and ERCO that petitioner was authorized to work on secret contract work.

(3) On April 17, 1953, following the abolition of the PSB and the IERB, the Secretary of the Navy wrote ERCO that, on a review of the case, he had concluded that petitioner's "continued access to Navy classified security information [was] inconsistent with the best interests of National Security." No hearing preceded

[1] On August 9, 1949, petitioner had been given a confidential clearance by the Army. On November 9, 1949, petitioner had been given a top secret clearance by the Assistant Chief of Staff G-2, Military District of Washington. On February 3, 1950, petitioner had been given a top secret clearance by the Air Material Command. All of these clearances were pursuant to industrial security requirements contractually imposed upon ERCO employees.

this notification. The Secretary further requested ERCO to exclude petitioner "from any part of your plants, factories or sites at which classified Navy projects are being carried out [and] to bar him access to all Navy classified information." ERCO had no choice but to comply with this request and petitioner was in fact discharged by ERCO on April 23, 1953. On October 13, 1953, petitioner was advised that the Navy had requested the Eastern Industrial Personnel Security Board (EIPSB) to make a final determination concerning petitioner's status. A hearing before the EIPSB took place on April 28, 1954, again without any confrontation by petitioner of adverse witnesses, if any. Thereafter the EIPSB affirmed the action of the Secretary of the Navy and ruled that granting clearance to petitioner for access to classified information was "not clearly consistent with the interest of national security." On September 16, 1955, petitioner requested review by the Industrial Personnel Security Review Board. On March 12, 1956, petitioner received a letter from the Director of the Office of Industrial Personnel Security affirming the determination of the EIPSB.

(4) In 1954, following the EIPSB determination, petitioner filed a complaint in the United States District Court for the District of Columbia asking for a declaration that the revocation of his clearance was unlawful, for an order restraining Department of Defense officials from acting pursuant to such revocation, and for an order requiring such officials to advise ERCO that the revocation was void. The District Court granted the Government's motion for summary judgment, 150 F. Supp. 958, and the Court of Appeals affirmed, 254 F. 2d 944 (App. D.C.).

(5) Petitioner obtained review of the Court of Appeals judgment in this Court. On June 29, 1959, this Court held that "in the absence of explicit authorization from either the President or Congress [the Secretaries of the armed forces] were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene* v. *McElroy*, 360 U.S. 474 at 508.

On December 14, 1959, pursuant to the decision and judgment of this Court, the District Court ordered "that the action of the Secretary of Defense and his subordinates in finally revoking plaintiff's security clearance was and the same is hereby declared to be not validly authorized" and "that any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked are hereby annulled and expunged from all records of the Government of the United States." (R. 4). Thereby expunged were the adverse determinations of the PSB (Dec. 11, 1951), the Secretary of the Navy (April 17, 1953), the EIPSB (May 30, 1954), and the Director of the Office of Industrial Personnel Security (March 12, 1956). Left on the record and in effect were the three security clearances obtained prior to Dec. 11, 1951, and the IREB order of Jan. 29, 1952, authorizing petitioner to work on secret contract work.

C. Petitioner's Attempts to Obtain Restitution From the Defense Department

(1) On December 28, 1959, petitioner made a formal demand on the General Counsel of the Department of the Navy "for monetary restitution from the Department of the Navy and/or the Department of Defense

pursuant to Section 26 of the Industrial Personnel Security Review Regulation, 20 Fed. Reg. 1553." (R. 4).

(2) On January 11, 1960, the General Counsel of the Department of the Navy acknowledged the demand and requested that certain dates and financial data be supplied, stating that if such information were supplied the claim would receive "such consideration as it deserves." A statement of Greene's legal position respecting the applicability of Section 26 was also requested. (R. 4).

(3) On April 20, 1960, petitioner supplied the General Counsel of the Department of the Navy with the requested information and statement of legal position. He stated under oath that he had incurred a $49,960.41 loss of earnings from April 23, 1953, the date of his dismissal, up to December 31, 1959. (R. 4-5).

(4) On January 4, 1961, having been advised that his claim had been forwarded to the Director of the Office of Security Policy of the Department of Defense for final determination, petitioner renewed his claim in a letter addressed to the said Director. Petitioner, understanding that the Director was disposed to deny the claim, also requested an opportunity to know and rebut the legal representations made in support of any disposition to deny the claim. (R. 5).

(5) On February 8, 1961, the said Director responded that Greene might submit in writing any additional material as to his legal position by March 3, 1961. The Director also stated that "this Department is prepared, at his [Greene's] request, to consider his case under the above-mentioned 1960 Review Regulation [Industrial Personnel Access Authorization Re-

view Regulation, DOD Directive 5220.6, dated July 28, 1960] and to take such action as may be necessary to reach a final determination as to whether it is in the national interest to grant him an authorization for access to classified information." (R. 5).

(6) On March 2, 1961, Greene wrote to the said director restating his legal position as to the applicability of Section 26 and declining to request a reconsideration of his case under the 1960 regulation. He therein stated that he could not

> . . . agree to any procedure which might result in a new, adverse determination which could then be used by the Department to bolster the argument that Section 26 does not apply to this case. And such a possible determination—whether made by the Screening Board or the Hearing Board—could arguably have a retroactive effect so as to give the semblance of legality to the clearance revocation dating back to 1953. Quite clearly the Supreme Court determination that this revocation was ununlawful is not subject to a subsequent administrative determination that the revocation was lawful. That is particularly true where the purported effect of the latter determination might retroactively destroy a claim for loss in earnings. (R. 5-6).

(7) On March 16, 1961, the said Director responded by re-emphasizing the Department's "willingness to process the question of Mr. Greene's current eligibility for access authorization under the provisions of the 1960 Review Regulation." (R. 6).

(8) On April 4, 1961, Greene inquired of the said Director as to whether, pursuant to Paragraph V.B. 1 of DOD Directive 5220.6, dated July 28, 1960, the Director had authority to reopen the case on his own motion and take such steps as might be deemed neces-

sary to complete reconsideration without a formal request from Greene (R. 6).

(9) On May 15, 1961, the said Director replied that "As has been indicated previously, this Department is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regulation." (R. 6).

(10) Finally, on June 1, 1961, the Deputy General Counsel of the Department of the Navy advised plaintiff that "In accordance with Department of Defense policy, it has been determined by the Department of Defense that Mr. Greene does not qualify for monetary restitution under the provisions of Paragraph 26 and that, therefore, his claim, being premature, cannot be given further consideration at this stage of the administrative proceedings." It was further stated that "the Department of Defense has informed you that it is prepared at Mr. Greene's request to undertake the processing of his case under the July 28, 1960 Review Regulation, and that if he does so request, prompt action will be taken thereon." (R. 6-7).

D. Proceedings in the Court of Claims

Petitioner filed this suit in the Court of Claims on May 7, 1962, alleging the facts stated above, and claiming that he was entitled to monetary restitution "in an amount equal to the salary or pay which he would have earned at the rate he was receiving on the date of his suspension from employment by ERCO less his earnings from other employment."[2] (R. 7). Petitioner

[2] During the period from April 23, 1953, to April 23, 1962, plaintiff had earnings from other employment in the amount of $95,039.59. During the same period he would have had earnings from employment with ERCO, at the rate he was receiving on the date of his suspension, in the amount of $162,000.00. (R. 7).

based his claim on the Fifth Amendment and Par. 26 of the 1955 Directive. (R. 7-8).

The United States did not file an answer within the original allotted time.[3] Before the extended time for filing the answer had elapsed, Commissioner Day *sua sponte* entered an order (R. 30) on December 5, 1962, reading as follows:

> "In view of the action this day by the court in *Stephen L. Kreznar* v. *The United States*, No. 47-60, and *Novera Herbert Spector* v. *The United States*, No. 48-60, further proceedings herein are hereby suspended pending pursuit of administrative remedies by the Department of Defense."[4]

The "administrative remedies" referred to, while as yet not pinpointed by the Government, presumably are those in Par. V.C. of the DOD Directive 5220.6, adopted in 1960 following the *Greene* decision. That paragraph states that reimbursement for loss of earnings "may be allowed" following a final administrative determination that access authorization is *presently* consistent with the national interest and where the prior

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[3] The Government had filed a motion to suspend proceedings on July 5, 1962. (R. 9). Petitioner filed objections thereto (R. 15), and on September 5, 1962, Commissioner Day denied the motion (R. 14) and granted the Government 30 days to file its answer. The Government's failure to seek review of Commissioner Day's denial of the motion within five days made such action that of the Court of Claims under Rule 37(d)(4) of that court. The Government did not renew its motion. Commissioner Day's order of December 5, 1962, suspending proceedings was *sua sponte*.

[4] The action of the Court of Claims on "this day"—December 5, 1962—in *Kreznar* and *Spector* related to denials of leave to file further petitions for rehearing in light of the September 5 order of Commissioner Day in the instant case (which had become the order of the court, see footnote 3, *supra*) denying the Government's motion to suspend.

adverse determination has been found "unjustified." In other words, the 1960 Directive said to be now available to petitioner places three conditions on monetary restitution: (1) a final administrative determination that access clearance is presently consistent with the national interest, (2) an administrative determination that the prior removal of clearance was unjustified, and (3) a favorable exercise of administrative discretion that reimbursement would be justified.

Pursuant to Rule 37(d)(4) of the Court of Claims, petitioner duly requested review of Commissioner Day's order. Petitioner claimed that the order was inconsistent with this Court's decision in *Greene* v. *McElroy,* 360 U.S. 474, that the doctrine of administrative remedies had no application under these circumstances, and that his right to monetary restitution was vested and immune from administrative disfeasance. (R. 31-39). Petitioner further stated that he "does not need or want any access authorization under the 1960 Directive." (R. 33).

On December 20, 1962, Acting Chief Judge Laramore on behalf of the Court of Claims denied the request for review, thereby under Rule 37(d)(4) making Commissioner Day's order of suspension that of the Court of Claims.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Contrary to Greene v. McElroy, 360 U.S. 474

The decision below that petitioner's claim for monetary restitution is dependent on exhaustion of further administrative proceedings is in direct conflict with the determination of petitioner's rights by this Court in *Greene* v. *McElroy,* 360 U.S. 474. In that case the

Court held (360 U.S. at 508) that Defense Department officials "*were not empowered to deprive petitioner of his job* in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." [Emphasis added.] Having been illegally deprived of his job, petitioner necessarily became entitled to appropriate restitution for the losses suffered as a result of that illegal deprivation.

On remand following this Court's opinion and judgment in *Greene*, the District Court in this case entered an order annulling and expunging from all Government records "any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked." (R. 4). Up to the present moment, therefore, Greene is a man who has been illegally deprived of his job and who has no adverse security determinations on his record during the period of that illegal deprivation. It is plainly impermissible to say, as the court below did, that his right to monetary restitution now depends upon some sort of retroactive or *ex post facto* administrative proceeding, whereby a new and needless determination of access eligibility is to be made. A right declared by this Court to have been improperly invaded is not thereafter subject to administrative disfeasance.

That Greene's right to recover for the illegal loss of his job was among the considerations before the Court at the time of the *Greene* decision is readily apparent. In the companion case, *Taylor* v. *McElroy*, 360 U.S. 709, argued immediately prior to *Greene*, the Government urged that the matter was moot because, after certiorari had been granted, the Secretary of Defense had determined that Taylor was eligible for access

clearance and had expunged all adverse determinations. The Solicitor General stated orally, in response to a question from the Bench, that Taylor was "eligible under applicable regulations for compensation for wages lost during the time he was unemployed due to the clearance revocation and denial." 360 U.S. at 711. This representation, which was accepted by the Court in agreeing that the case was moot, was necessarily based on Paragraph 26 of the 1955 Defense Department Directive,[5] one of the bases for Greene's claim in the instant proceeding. Greene and Taylor had sought the same relief in their District Court complaints and the mootness issue turned on whether the Government had afforded Taylor sufficiently complete relief that he would not be disadvantaged by failure to get an appropriate order from the District Court. Neither the Solicitor General nor Assistant Attorney General Doub (who argued the *Greene* case) gave any hint that in the event of a judgment favorable to him, on the issues raised, Greene would not be eligible for compensation under the same Paragraph 26.[6]

Further explicit evidence that the Court intended or understood that its decision would result in monetary reimbursement to Greene is the dissenting opinion of Mr. Justice Clark, who objected that the *Greene* decision "subjects the Government to multitudinous ac-

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[5] Paragraph 26 provides in pertinent part as follows:

"In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance."

[6] While the transcript of the oral argument is not available to petitioner, the recollection of counsel on this matter is supported by the report of the argument at 27 U.S. Law Week 3275-3280.

tions—and perhaps large damages—by reason of discharges made pursuant to the present procedures", 360 U.S. 474, 510 at 523-24.[7] Neither the majority opinion nor the concurrence of Mr. Justice Harlan contradicted Mr. Justice Clark's assertion regarding the Government's potential liability.

If the Court had not intended this result it is highly likely that it would have said so, since the reimbursement program of Paragraph 26 was discussed in the Court's opinion (360 U.S. at 504-505) in connection with the Government's contention that Congress had ratified the program. The Government had relied on Hearings Before the House Committee on Appropriations on Department of Defense Appropriations for 1958, 84th Cong., 1st Session, pp. 774-781. In the course of those hearings the following colloquy concurred:

> MR. WHITTEN: "What basis would there be for us paying him anything? There is no relationship which puts any responsibility upon the Federal Government."
>
> GENERAL MOORE [Special Assistant to the Comptroller, Department of Defense]: "There is certainly, I believe, one of equity and justice. These employees that we are talking about being relieved, even though temporarily, are being relieved at the suggestion of representatives of the Federal Government." (id. at 777.)

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[7] Earlier in his opinion Mr. Justice Clark had written: "But the action today may have the effect of by-passing that exemption since Greene will now claim, as has Vitarelli, see *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), reimbursement for his loss of wages. See *Taylor* v. *McElroy*, *post*, p. 709. This will date back to 1953. His salary at that time was $18,000 a year." Indeed, the computation of Greene's present back-pay claim involves the fact that he received $18,000 a year from the job of which he was deprived.

This testimony cannot have escaped the Court's attention, since its opinion in *Greene* evinces a careful study of those hearings.[8]

In the court below, the Government argued that this Court's *Greene* decision related only to the proceedings before the appeal boards (IERB and EIPSB) and not to the original charges, actions and tentative decision of the screening board (PSB).[9] The decision was said to relate only to improper administrative appellate procedure rather than to the substance or effectiveness of the original adverse security determinations.

The holding of the *Greene* case cannot be so restricted or nullified. When this Court ruled that the

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[8] See particularly 360 U.S. at 505, n. 30, stating that a certain passage was the "*only* description made to the Committee concerning the procedures used in the Department's clearance program". (Emphasis added). This assertion presupposes an examination of the entire testimony.

The Government's brief had cited, but not discussed this testimony. Brief for Respondents, No. 180, Oct. Term, 1958, p. 27, n. 8.

[9] The Government asserted below (R. 9) that the instant case "is identical in all material aspects" to *Kreznar* v. *United States*, Ct. Cl. No. 47-60, in which a petition for certiorari is being filed this day. In the response to the plaintiff's motion for summary judgment, etc. pp. 22-23 in *Kreznar* (pp. 109-110 of the record of that case in this Court) the Government argued as follows:

> "Consequently, the Supreme Court's decision means only that the Department of Defense was required to revise its procedure in order to conform to the Court's mandate. It means only that the action finally depriving the individual of his job without the right of confrontation and cross-examination was not authorized and is not binding. It does not mean that, because of this shortcoming in the proceedings, the Statement of Reasons, which set forth the charges, or the initial action of the Screening Board, have been vacated. These remain outstanding, just as the original suit remains pending when a higher court finds error in the lower court's handling of the case and remands it for retrial."

procedures whereby Greene was deprived of his job were unauthorized, it meant all procedures leading to that deprivation. And the initial actions and determinations of the screening board which caused Greene to be separated from his job (see 360 U.S. at 476-477) were an integral part of those procedures. The absence of authority which this Court found in *Greene* encompassed all actions leading to the loss of employment. To read the decision otherwise, as the Government would do, is to attribute to this Court the paradoxical holding that hearings before the appeal boards that lacked basic due process were unauthorized, but that unilateral action by a screening board that accorded no hearing or due process whatever and that effectively removed him from his job must be considered authorized and still in effect. Such an analysis refutes itself.[10]

In support of its stultifying analysis, the Government cited only the concurring opinion of Mr. Justice Harlan in the *Greene* case, 360 U.S. at 509-510. But Mr. Justice Harlan there made no reference to the continuing efficacy of prior screening board actions. He merely pointed out that the basic issue in *Greene* was "not whether petitioner is entitled to access to classified material" and that "nothing in the Court's opinion . . . suggests that petitioner must be given access to classified material."

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[10] Moreover, quite apart from this Court's opinion in *Greene*, the ensuing order of the District Court, entered by consent on remand, clearly annulled and expunged "any or all rulings, orders, or determinations wherein or whereby plaintiff's security clearance was revoked." It cannot be seriously contended that the rulings, orders, or determinations of the screening board are not encompassed by that order.

The fact that the Court in *Greene* did not determine that Greene was entitled to access, of course, is not relevant to his right to restitution for illegal loss of his job. Denial of present access clearance, if such be the case here, is clearly consistent with payment for losses resulting from improper or unlawful revocation of past access clearance. And where, as Mr. Justice Harlan noted (360 U.S. at 508), there was no authorization for the procedures invoked in the revocation of Greene's clearance, it follows that the right to restitution for the resulting injury becomes essential if the "equity and justice" promised by the Department of Defense are to prevail.[11]

The intent and the command of the *Greene* decision are clear. The order below cannot stand in light thereof.

2. The Question of Petitioner's Right to Just Compensation Is Important and Substantial

In addition to his claim under the 1955 regulation, petitioner relies in this suit on the Fifth Amendment, which entitles him, without regard to further administrative proceedings, to just compensation for the job of which he was deprived. This question is of the utmost importance, since it directly affects the right to employment of the millions of Americans presently covered by the Industrial Personnel Security Program, plus the millions of others who may come under it in the

[11] For purposes of achieving such "equity and justice", and possibly in order to avoid Fifth Amendment claims as to just compensation, the "final determination . . . favorable to a contractor employee" referred to in Paragraph 26, DOD 5220.6, 25 Fed. Reg. 1535 (1955), is not to be confined to final determinations of present access clearance. The phase also relates to a final determination by this Court or any other final authority that the procedures used in revoking a prior access authorization were illegal or unauthorized.

foreseeable future; plainly, the nation's defense production is likely to increase rather than diminish.[12] And in a larger sense all citizens have a stake in the fundamental question whether the government may, in the pursuit of some public policy, destroy the livelihood of one of their number without reimbursing him for his loss. We think that the question was answered by the adoption of the Bill of Rights: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". *Armstrong* v. *United States*, 364 U.S. 40, 49.

The importance of the question being clear, elaboration of the merits would be inappropriate in this petition. Suffice it to say that the same Constitution which requires just compensation when the Government deprives a person of his contract to build a ship,[13] or of the enjoyment and use of his own land,[14] or his right

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[12] Rather surprisingly, the exact figures on the number of individuals currently affected is apparently unavailable. In March, 1962, the Deputy Assistant Secretary of Defense for Security Policy, Mr. Walter T. Skallerup, Jr., estimated that "the cumulative total number of access authorization granted in industry since 1949 is 5,000,000." Hearings Before the Committee on Un-American Activities, House of Representatives—Relating to H.R. 10175, etc. (87th Cong. 2nd Session), p. 460. This is already a substantial increase from the figure three and one-half years earlier (November 21, 1958) of approximately 3,300,000 reported by the Government in its brief in *Greene* v. *McElroy*. Brief for Respondents, No. 180, Oct. Term, 1958, p. 16, n. 6a.

[13] *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106.

[14] *United States* v. *Causby*, 328 U.S. 256.

to flood another's land[15] requires the Government to make whole the citizen whose livelihood it has destroyed.[16]

3. The Suspension of Proceedings Was Contrary to Proper Judicial Administration

The court below, without passing on the merits of petitioner's claim, and without stating the reasons for its action, suspended proceedings in petitioner's suit "pending pursuit of administrative remedies by the Department of Defense." We submit that the court thereby parted from the proper and usual course of judicial administration.

The seriousness of the court's error and the hardship on petitioner in requiring him to proceed before the Defense Department are clear when the precise issues which were before the court, and the proposed administrative remedy, are considered and contrasted: Petitioner's claim for relief presented no question of fact (except the calculation of the amount due) and two questions of law: 1) Whether he has a right to

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[15] *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624.

[16] The Defense Department apparently adheres to the view that it has no obligations to those whom it wrongfully deprives of their jobs. That is the import of their new regulations which make reimbursement a matter of grace; even where the employee obtains what the Department itself considers to be "a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified," it provides only that "reimbursement *may* be allowed". (DOD Directive 5220.6, issued July 28, 1960, Par. V.C.). After *Greene* v. *McElroy*, *supra*, this narrow view is no longer tenable. See also *Hannah* v. *Larche*, 363 U.S. 420, 451, where the Security Clearance Boards in *Greene* were stated to "have made determinations in the nature of adjudications affecting legal rights."

reimbursement under the 1955 regulation; and 2) whether he has such right under the Constitution. Neither of these questions would be answered in the proceedings before the Defense Department, which has already failed to honor his claims under the Regulation (see pp. 7-10, *supra*) and is plainly without power to decide the constitutional question. The issue which the Defense Department offers to decide are petitioner's right under the *1960* regulation which, the Government has asserted, depends in part on whether he would presently be granted access clearance. Thus, the Court of Claims' order requires petitioner to submit to another Security Board hearing and to obtain access authorization for the future as preconditions to an adjudication of his right to reimbursement for the loss of his job in the past due to the unauthorized action of the earlier Boards.

The order of the court below is contrary to the principles of "sound and expeditious judicial administration" enunciated in *Southwestern Sugar Company v. River Terminals Corp.*, 360 U.S. 411. In that case the district court had entered judgment for plaintiffs, and defendants had raised four claims of error on appeal. One of these claims of error raised an issue which required preliminary consideration by the Interstate Commerce Commission, while each of the other three could have been considered by the Court of Appeals and would have been dispostive of the case if sustained. The Court of Appeals dealt only with the former issue and remitted the parties to the Interstate Commerce Commission. This procedure was held to be error:

> "At the outset, we hold that the Court of Appeals erred in ordering what was in substance a referral of the issue of the validity of the exculpa-

tory clause to the Commission without first passing on the other claims of error tendered by respondent below. As we have noted, those other claims, if accepted, would have required a reversal of the judgment of the District Court and the entry of judgment for respondent. The case had been fully argued before the Court of Appeals, and those claims were plainly ripe for decision.

"Under these circumstances, we think that sound and expeditious judicial administration should have led the Court of Appeals not to leave these issues undecided while a course was chartered requiring the institution and litigation of an altogether separate proceeding before the I.C.C.—a proceeding which might well assume substantial dimensions—to test the sufficiency of only one of respondent's several defenses. If in consequence of findings made by the Commission in such a proceeding it should be determined that the exculpatory clause cannot be given effect, the Court of Appeals would then have to decide the very questions which it can now decide without the necessity for any collateral proceeding. Conversely, a present ruling on those other questions might entirely obviate the necessity for proceedings in the Commission which would further delay the final disposition of this already protracted litigation. We conclude, therefore, that the Court of Appeals should have passed upon those issues as to which the expert assistance of the I.C.C. is concededly not appropriate, before invoking the processes of the Commission." 360 U.S. at 414-15.

A determination favorable to petitioner regarding his rights either under the 1955 regulation or under the Fifth Amendment would be dispositive of the case, and proceedings before the Defense Department cannot shed light on either of these issues. Thus, even if the Defense Department proceedings were relevant to

some issues, the *Southwestern Sugar* case would require the Court of Claims to settle petitioner's rights under the 1955 regulation or under the Fifth Amendment before turning to the issues which require prior administrative consideration. But since petitioner's rights under the 1960 regulation (which alone are offered to be resolved by the Defense Department) are entirely irrelevant to any issue before the Court of Claims, the doctrine of exhaustion of administrative remedies should not come into play at all. As stated in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 359, 63, that doctrine "applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process had run its course."[17] Such is certainly not the case here.

The irrelevancy of the administrative proceeding to the issues before the Court of Claims is one of several reasons why *Gusik* v. *Schilder*, 340 U.S. 128, on which the Government relied heavily below, is inapposite. *Gusik* was a *habeas corpus* case to review the action of a court martial. The issues which Gusik sought to raise on *habeas corpus* could, under Article 53 of the Articles of War, be determined by the Judge Advocate General, and a new trial awarded. Moreover, the new remedy which Gusik was required to exhaust was one prescribed by Congress in the Articles of War and not, as here, by the Defense Department. The doctrine of exhaustion of administrative remedies properly respects the procedures which Congress had established for judicial review. See e.g. *Myers* v. *Bethlehem Ship-*

[17] This statement was quoted with approval in *United States* v. *R.C.A.*, 358 U.S. 334, 346, n. 14.

building Corp., 303 U.S. 41, 48-50. It was not intended to empower agencies to subject parties to an unending succession of administrative procedures and thereby to postpone indefinitely the day of reckoning in court. Such agency action is all the less permissible where the new procedure was instituted, as here, *post litem motam.*

The course required by the order below is subject to other substantial objections. If petitioner proceeds as directed before the Department of Defense and if the Department decides adversely to him, he may be seriously prejudiced in his suit in the Court of Claims, for it would appear to be the logic of the Government's position—although the Court of Claims did not so hold—that petitioner is entitled to reimbursement for his past loss earnings *only* if he is now determined to be eligible for access clearance in the future and *only* if the prior and expunged adverse determinations are now found to be "unjustified" on the merits. But the purported remedy before the Defense Department is by its own terms discretionary, for even if access authorization is granted and if it is determined that the prior revocation was unjust, reimbursement "*may* be allowed." See par. V.C. p. 3a, *infra.* (Emphasis supplied.) *Smithmayer* v. *United States,* 147 U.S. 342, 357-58, holds that the jurisdiction or adjudicatory duty of the Court of Claims cannot be ousted by the possibility of such a discretionary remedy.[18]

[18] Moreover, factual determinations of the Department would presumably not be judicially reviewable. And the statutory and constitutional validity of the procedures would be reviewable, if at all, only in the district courts. See *Pennsylvania Railroad Co.* v. *United States,* 363 U.S. 202; *Almour* v. *Pace,* 193 F. 2d 699 (App. D.C.). Thus for example, if Greene were again denied confrontation of adverse witnesses, as the 1960 regulation would still permit, he would be required to institute a new suit to determine whether the application of such procedures is valid.

Finally, even if the other conditions for requiring exhaustion had been met, the doctrine could not properly be invoked in this case because of the nature of the proposed remedy. This Court, having studied the record of petitioner's previous security hearings,[19] and of other similar hearings as well,[20] will readily understand why petitioner is unwilling to endure another. Apart from their procedural inadequacies, such hearings violently intrude into the individual's privacy, subjecting his entire life to hostile scrutiny. There is no need to consider here whether they are a necessary and proper price for the preservation of government secrets. Petitioner does not seek access clearance. This is a suit for money. It should be tried by the courts, not by a security board.

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1, 1963.

[19] Proceedings of January 23, 1952 before the Industrial Employment Review Board, Transcript of Record, No. 180, Oct. Term 1958, pp. 39-171; proceedings of April 28, 29, 30, 1954 before the Eastern Industrial Personnel Security Board, *Ibid.* pp. 184-461.

[20] See e.g. *Vitarelli* v. *Seaton*, 359 U.S. 535, particularly note 5, pp. 542-544.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 153-62

(Issued December 5, 1962)

WILLIAM L. GREENE, *Plaintiff*,

v.

THE UNITED STATES, *Defendant*.

Order

In view of the action this day by the court in *Stephen L. Krezmar* v. *The United States*, No. 47-60, and *Novera Herbert Spector* v. *The United States*, No. 48-60, further proceedings herein are hereby suspended pending pursuit of administrative remedies by the Department of Defense.

/s/ WILLIAM E. DAY
William E. Day, *Commissioner*.

Inscribed on bottom of first page of plaintiff's request for review of Commissioner's order under Rule 37 (R. 31):
"DENIED DEC. 20, 1962 /s/DNL"*

Clerk's Office
Washington, D. C., December 20, 1962

To Attorney of Record and Assistant Attorney General, and Commissioner

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's request for review of Commissioner's order under Rule 37, the following order:

DENIED.

Very truly yours,

FRANK T. PEARTREE
Clerk, Court of Claims

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* Don N. Laramore, Acting Chief Judge.

APPENDIX B

United States Constitution, Amendment V:

> No person shall be * * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955: * * * par. 26:

> *Monetary Restitution.* In cases where a final determination is favorable to a contractor employee, the department whose activity originally forwarded the case to the Director will reimburse the contractor employee in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance. Such amount shall not exceed the difference between the amount the contractor employee would have earned at the rate he was receiving on the date of suspension and the amount of his interim net earnings. No contractor employee shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under this regulation.

Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960:

> V. *Miscellaneous*
>
> * * * B. *Reconsideration of Prior Decisions* * * *
>
> 1. Decisions rendered under any industrial personnel review program prior to the effective date of this Regulation which denied or revoked an access authorization may be reconsidered by such boards as the Director deems appropriate at the request of the applicant, addressed through the Director, after a finding by the appropriate board that there is newly discovered evidence or that other good cause has been shown. When-

ever a final determination of denial or revocation based upon a personal appearance proceeding is found to have been unauthorized at the time it was made, authority is hereby delegated to the Director, Office of Industrial Personnel Access Authorization Review, to vacate such final determination and all subsequent administrative action predicated thereon and to take such other steps as may be deemed necessary to complete reconsideration of the case.

• • •

C. *Monetary Restitution*

If an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization, and at a later time a final administrative determination is made that the granting to him of an access authorization at least equivalent to that which was suspended, revoked or denied, would be clearly consistent with the national interest and it is determined by the board making a final favorable determination that the administrative determination which resulted in the loss of earnings was unjustified, reimbursement of such loss of earnings may be allowed in an amount which shall not exceed the difference between the amount the applicant would have earned at the rate he was receiving on the date of suspension, revocation, or denial of his access authorization and the amount of his interim net earnings. The filing and processing of any such claim shall be in accordance with such regulations as the Secretary of Defense may prescribe after consultation with the Administrators. Payment shall be limited to claims administratively determined to be just and equitable. No applicant shall be compensated for any increase in his loss of earnings caused by his voluntary action in unduly delaying the processing of his case under any industrial personnel review program. Payments under this provision shall

be in full satisfaction of any and all claims, of whatever nature they may be, which the applicant has or may assert against the United States, or the Department of Defense or any of its agencies or activities, or the Federal Aviation Agency, or the National Aeronautics and Space Administration, or any of them, by reason of or arising out of the suspension, revocation or denial of access authorization.